Supreme Court, U.S.
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No. 03-1305

IN THE

Supreme Court of the United States

KRYSTAL CADILLAC-OLDSMOBILE-GMC TRUCK, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION and
GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should grant Certiorari where the ruling for which review is sought does not present a conflict with a decision of any other Circuit Court and is entirely consistent with this Court's recent and thorough discussion of the doctrine of judicial estoppel?

2. Whether a court may dismiss a cause of action on argument and briefs alone where the record is undisputed, an evidentiary hearing is unnecessary, and there is no room for a reasonable trier of fact to rule otherwise?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

General Motors Corporation has no parent company and State Street Bank is the only shareholder that owns more than 10% of GM's outstanding shares.

General Motors Acceptance Corporation is a wholly owned subsidiary of General Motors Corporation.

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CONSTITUTIONAL PROVISION INVOLVED

Respondents disagree that the U.S. Constitution, Amendment V, is involved in this matter.

STATEMENT OF THE CASE

This unique dispute involves numerous proceedings in both federal and state courts and labyrinthine facts spanning more than a decade, but it raises no issue meriting this Court's review. The Third Circuit properly applied the doctrine of judicial estoppel consistent with this Court's opinion in *State of New Hampshire v. State of Maine*, 532 U.S. 742 (2001) to dismiss Petitioner's claims in this action. The undisputed evidence shows that in the bankruptcy proceeding Petitioner initiated, Petitioner duplicitously concealed the existence of each of the claims in this case and arrogated them to itself in order to profit at the expense of its creditors.

A. Proceedings prior to this action

Petitioner, former Gettysburg General Motors Corporation ("GM") dealer Krystal Cadillac-Oldsmobile-GMC Truck, Inc. ("Krystal"), defaulted on its GM Dealer Agreement obligations in 1991 when it lost its "floor plan" financing, precluding it from purchasing new GM vehicles. (Appendix attached to the Petition ("App.) 5a.) GM subsequently notified Krystal of its intent to terminate Krystal's GM Dealer Agreements because Krystal was a GM dealer in name only. However, on August 11, 1993, the day before termination was to be effective, Krystal filed a protest of the termination notice with the Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons ("Vehicle Board"), the state agency charged with regulating the termination of new vehicle dealer franchises. 63 P.S. § 818.13.

Following a hearing before the Vehicle Board, but *before* the Vehicle Board issued its adjudication, on September 8, 1994, Krystal filed a Chapter 11 bankruptcy petition. On September 27, 1994, the Vehicle Board upheld the termination of Krystal's GM Dealer Agreements. Krystal filed an appeal of the Vehicle Board's decision with the Pennsylvania Commonwealth Court, where it argued for the first time that the automatic bankruptcy stay attendant to its Chapter 11 petition prohibited termination of its GM Dealer Agreements.

While the Commonwealth Court appeal was pending, on June 15, 1995, Krystal filed a Chapter 11 Plan of Reorganization in which it provided for the sales of its GM franchises to pay its creditors.[1] In July 1995, GM objected to the Plan on the basis that the Vehicle Board had previously upheld the termination of Krystal's GM Dealer Agreements. (App. 116a; Amended Complaint, ¶42.) Thereafter, on October 24, 1994, Krystal filed an Amended Disclosure Statement that contained the following boilerplate language:

> [T]he status of [Krystal's GM franchise] is not in litigation. General Motors terminated the franchise prior to the commencement of the case and the matter was in litigation at the time the Chapter 11 petition was filed. General Motors nevertheless proceeded with termination and the matter is now on appeal in the [Pennsylvania]

1. We present a correct statement of the facts in recognition of Rule 15(2). Among the misconceptions created by the Petition is Krystal's claim that under its Reorganization Plan, secured and priority creditors were to be paid in full. In fact, such payment was contingent on Krystal selling the GM franchises at some undetermined profit.

> Commonwealth Court. Debtor takes the position, which is vigorously contested by General Motors, that this franchise agreement remains an asset of the case.

(App. 7a.)

Krystal's Amended Disclosure Statement did *not* disclose the existence of any of the seven claims which it asserts in this action, even though Krystal had knowledge of each of them at the time it filed its Disclosures on October 24, 1995. These claims, and the time when they were factually known are:

> *Count I* of the Amended Complaint alleged that GM supposedly committed a willful violation of the automatic bankruptcy stay under 11 U.S.C. § 362(h): but, as shown above, Krystal knew at least in July 1995 that GM sought to enforce the Vehicle Board's termination of the Dealer Agreements in the Bankruptcy Court, thus supposedly violating the automatic stay. (Amended Complaint, ¶42.) (App. 116a.)

> *Counts II through VII* of the Amended Complaint related to the attempted termination of Krystal's GM Dealer Agreements in 1994 and the events leading up to it, each event occurring prior to the Disclosure requirement and, in fact, pre-petition.[2]

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2. Krystal's Appendix to its Petition is misleading since the copy of the Amended Complaint omits 61 paragraphs and five counts of the Amended Complaint, all dealing with pre-petition matters.

Subsequent to Krystal's filing of the Amended Disclosure Statement, on November 6, 1995, the Pennsylvania Commonwealth Court rejected Krystal's attempt to undo the termination of the GM Dealer Agreements when it affirmed the Vehicle Board's decision, holding (because this is the first time Krystal had raised the issue) that the termination of Krystal's GM Dealer Agreements did not violate the automatic bankruptcy stay.

The Bankruptcy Court thereafter denied Krystal's Motion to Assume and Assign Krystal's GM Dealer Agreements and afforded preclusive effect to the Commonwealth Court's decision, including the determination that the automatic bankruptcy stay did not preclude termination of the GM Dealer Agreements. The District Court affirmed, but the Third Circuit, in *In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631 (3d Cir. 1998) (*Krystal I*), reversed and held that GM's defense of the determination of the Vehicle Board proceeding (a proceeding initiated by Krystal) was deemed to be an act to take possession of property of the bankruptcy estate (the GM franchises) in violation of the automatic stay provision of 11 U.S.C. § 362(a)(3).

B. The instant action

In 1998, Krystal initiated this action in the District Court for the Eastern District of Pennsylvania despite the absence of any factual or legal nexus of these claims to that forum. On GM's Motion, the action was transferred to the Middle District Court of Pennsylvania, where the bankruptcy had been pending for many years. Following GM's Motion to Dismiss, the Bankruptcy Court dismissed all counts of Krystal's Complaint, and the District Court affirmed, as did the Third Circuit in the decision sought to be reviewed, reported at

337 F.3d 314 (3d Cir. 2003) (*Krystal II*). Each of the courts held that judicial estoppel barred Krsytal's claims since Krystal failed to disclose the existence of any of its alleged claims in its Amended Disclosure Statement filed in the bankruptcy action despite having knowledge of each of them.

In *Krystal II*, The Third Circuit fairly concluded that Krystal's non-disclosures constitute "what appears to be duplicitous conduct. . . ." (App. 24a.) It properly recited the bankruptcy debtor's duty, pursuant to 11 U.S.C. § 1125(b), to provide full and honest disclosure of "all 'property of the estate' including all of the debtor's legal and equitable interests. This includes such contingent assets as any cause of action Krystal may have against GM, and Krystal does not argue to the contrary." (App. 16a.) The debtor's duty of full disclosure, the Third Circuit explained, is one that "'cannot be overstated,'" (App. 19a) or "'overemphasize[d]'" since it is "'the pivotal concept' in reorganization of a Chapter 11 debtor." (App. 17a) (citations omitted). Krystal's "boilerplate" Amended Disclosure Statement, *Krystal II* concluded, "did not specify any of the claims contained in the instant complaint against GM, much less attempt to place any monetary value on them." (App. 15a.)

REASON FOR DENYING THE PETITION

The Third Circuit's holding in Krystal II that the instant claims are barred by the doctrine of judicial estoppel is entirely consistent with this Court's thorough delineation of the factors pertinent to the application of that doctrine in *State of New Hampshire v. State of Maine*, 532 U.S. 742 (2001). Moreover, *Krystal II's* holding does not conflict in any manner with any decision of any Circuit Court. Nor does Krystal otherwise present a compelling reason for review.

I. The doctrine of judicial estoppel is uniformly applied since this Court's decision in *New Hampshire v. Maine.*

Krystal does not suggest, because it cannot, that *Krystal II's* application of the doctrine of judicial estoppel instantly was in any manner inconsistent with this Court's rationale, or that the Third Circuit misapplied any of the factors set forth in *State of New Hampshire*, *supra*. Instead, the Petition contrives to manufacture a reason for reviewing this case by claiming that the various Circuit Courts are applying the doctrine of judicial estoppel chaotically, characterizing it as a "controversial" (Petition at 6) and "ill-defined common law doctrine, without uniform national standards" whose "unrestrained use by the nation's federal court system . . . is a recurring issue worthy of consideration." (Petition at 8.)

Aside from paying lip service to *State of New Hampshire v. State of Maine*, *supra*, a decision in which all Justices joined (except Justice Souter, who recused himself), Krystal's Petition reads is as if that decision had never been written. But that decision's thorough discussion of the doctrine uncovered none of the purported chaos in the Circuit Courts' application of it advanced by Krystal or, for that matter, any other basis to rein in the doctrine's supposed "unrestrained use." This Court recognized that, by necessity, this equitable doctrine cannot be reduced to an inflexible formula, as Krystal apparently advocates, but must be guided by the application of various factors to the particular facts of each case.[3]

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3. This Court explained that

> courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," . . . by

(Cont'd)

Krystal references several purported differences in the manner in which the Circuit Courts supposedly apply the doctrine, but none of these supposed variations have anything to do with *this* case. In fact, with respect to the issue actually raised in this case (as opposed to the *other* purported

(Cont'd)

> "prohibiting parties from deliberately changing positions according to the exigencies of the moment,". . . . Because the rule is intended to prevent "improper use of judicial machinery," . . . judicial estoppel "is an equitable doctrine invoked by a court at its discretion,". . . . Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," . . . Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled,". Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," . . . and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

Id. at 749-51 (citations omitted).

applications of judicial estoppel Krystal goes out of its way to discuss), Krystal candidly admits that there is no conflict — that a bankruptcy debtor's failure to reference in bankruptcy schedules a potential cause of action "[t]ypically" and "often" will result in dismissal of the cause of action under principles of judicial estoppel. (Petition at 6-7.)[4]

On pages 9 through 11 of the Petition, Krystal parses selective language from various cases, all of which were decided *prior to New Hampshire v. Maine*, *supra*, to make it appear as if the Circuits are in turmoil, applying the doctrine without any standards. In fact, these purported differences are nothing more than the courts applying this well-defined doctrine to the unique facts under review before them. In addition, since all of the cited decisions were decided prior to this Court's clarification of the doctrine in *New Hampshire v. Maine*, *supra* (including a Tenth Circuit decision which is cited for that Circuit's pre- *New* Hampshire "frank rejection" of that doctrine)[5] they are scarcely authority for the proposition that "[t]here is no uniform expression of the judicial estoppel doctrine in the federal court system." (Petition at 9.)

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4. Krystal fails to point out that the lone Bankruptcy Court decision it cites for the proposition that a debtor's failure to disclose an asset in its schedules does not constitute a "position" taken for purposes of judicial estoppel, *Harker v. Troutman*, 253 B.R. 1 (B.A.P. 6th Cir. 2000), was, in fact, vacated. *In re: Troutman Enterprises, Inc.*, 286 F.3d 389 (6th Cir. 2002).

5. *But see, e.g., In Re Schempp Real Estate LLC*, 303 B.R. 866 (D. Colo. Bankr. Ct. 2003), where the court predicted that the Tenth Circuit will now follow this Court's rationale in light of *New Hampshire v. Maine*, *supra*. *See also*, *Beem v. McKune*, 317 F.3d 1175, 1185 (10th Cir. 2003) (Concurring Opinion).

Krystal II is consistent with this Court's careful discussion of the law and is not "in conflict with the decision of another United States court of appeals on the same important matter" to justify review. (Supreme Court Rule 10(a).)[6]

II. The Third Circuit did not misconstrue the law regarding the section 362(h) claim, or misapply a properly stated rule of law to these facts.

The lone reasons specific to this case that Krystal posits to support review are factually and legally incorrect: (1) Krystal alleges that it had no duty to raise the § 362(h) claim in its Amended Disclosure Statement since it did not accrue until after the bankruptcy petition was filed and, thus, was not property of the Chapter 11 bankruptcy estate. (2) Krystal alleges that it could not disclose the § 362(h) claim in the Amended Disclosure Statement since it did not accrue until after Third Circuit's 1998 ruling in *Krystal I* that GM violated the automatic bankruptcy stay; prior to *Krystal I*, Krystal claims, it was the "law of the case" that GM's actions did not violate the automatic stay.

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6. Krystal off-handedly contends that "the tort liability" for violating the automatic stay "was evident, as a matter of fact and law. . . ." (Petition at 7.) In fact, although *Krystal I* found that GM violated the automatic stay, the only court that has ever reached the issue of whether GM committed a "*willful*" violation of the stay, as required under Section 362(h), was the Bankruptcy Court, and it held that it did *not*. (App. 65a-67a.) Indeed, because GM's post-petition conduct was premised on persuasive legal authority, such conduct was not a *willful* violation. *In re University Medical Center*, 973 F.2d 1065 (3d Cir. 1992).

The assertion that Krystal's § 362(h) claim is not property of the estate was not raised by Krystal prior to the decision in *Krystal II* and is inconsistent with Krystal's stance in the lower courts, which led the Bankruptcy Court to conclude that Krystal "does not appear to contest that the instant causes of action belong to the estate." (App. 55a.)

In any event, this position is patently incorrect. This § 362(h) claim is a core proceeding that would not have arisen had it not been for the bankruptcy case. *See, e.g.*, the authorities discussed at App. 81a-88a. Any purported violation of the automatic stay by GM involved Krystal's GM Dealer Agreements, which were property of the estate, not the bankrupt. Consequently, any alleged violation of the stay involving the GM Dealer Agreements was an injury to the estate, not the bankrupt. Moreover, each of Krystal's seven claims for relief are anchored in activities that occurred pre-petition. A bankrupt's estate is not limited to include those claims that had accrued and were ripe at the time the petition was filed; it also includes those claims that accrue post petition and "are sufficiently rooted in the pre-bankruptcy past." *Segal v. Rochelle*, 382 U.S. 375 (1966). For these reasons, Krystal is unable to furnish this Court any authority to support its position.

As to *when* Krystal's § 362(h) claim accrued, Krystal continues to repeat a legally and factually erroneous assertion: each of the courts that have reviewed this matter, the Third Circuit, the District Court and the Bankruptcy Court, properly rejected the assertion that the § 362(h) claim did not accrue until after the ruling in *Krystal I* in 1998. In fact, at the time Krystal filed its Amended Disclosure Statement on October 24, 1995, Krystal had actual knowledge of the § 362(h) claim (as well as each of its other claims), but in "bad faith" failed

to disclose them. (App. 37a.) This is shown, for example, by Krystal's concession in its Amended Complaint that GM sought to enforce the state court's termination of the Dealer Agreements in the Bankruptcy Court (thus violating the automatic stay) in July, 1995, *prior to Krystal's October 24, 1995* filing of its Amended Disclosure Statement. (Amended Complaint, ¶42) (App. 116a.) (*See also*, App. 37a.) Moreover, in the Pennsylvania Commonwealth Court proceedings, prior to October 24, 1995, Krystal advocated that termination of its GM Dealer Agreements violated the § 362 automatic stay. In short, Krystal clearly could have asserted its § 362(h) claim in its Amended Disclosure Statement as there is no requirement that assertion of a § 362(h) claim need be preceded by a judicial determination that a violation has occurred. Most § 362(h) claims are asserted without any such determinations. *See*, *e.g.*, *In re Landsdale Family Restaurants, Inc.*, 977 F.2d 826 (3d Cir. 1992).

Krystal's contention that it was precluded from raising its § 362(h) claim by virtue of the doctrine of "law of the case" until after *Krystal I* was decided in 1998 is also factually and legally incorrect. At the time Krystal filed its Amended Disclosure Statement on October 24, 1995 (App. 8a), *no* court or agency had yet ruled that GM had not violated the automatic bankruptcy stay. Krystal did not raise this issue before the Vehicle Board, and the Commonwealth Court did not rule on this issue until November 6, 1995 – some two weeks *after* the Amended Disclosure Statement was filed. (App. 7a, 18a.) Thus, contrary to Krystal's position, this was not the "law of the case" on October 24, 1995.

Moreover, Krystal certainly believed it could challenge GM's right to terminate the Dealer Agreements, and did so in every court proceeding at issue over the last ten years.

Indeed, Krystal disclosed in the Amended Disclosure Statement its contention that the Dealer Agreements were assets of the estate, even though the Pennsylvania Vehicle Board had ruled in 1994 that GM properly terminated them. There is no reason why Krystal could not have asserted the § 362(h) claim in its Amended Statement.

Accordingly, the Third Circuit's decision sought to be reviewed (that Krystal was barred by judicial estoppel from asserting the § 362(h) claim) is a correct application of judicial estoppel to these facts, and in no sense can it be held to have "so far departed from the accepted or usual course of judicial proceedings . . . as to call for an exercise of [the] Court's supervisory power. . . ." (Supreme Court Rule 10(a).)

III. Krystal's procedural due process rights were not violated merely because the Court decided an issue on briefs and argument without an evidentiary hearing.

Krystal's contention that its procedural due process rights were violated because the judicial estoppel doctrine was applied without an evidentiary hearing but on the basis of briefs and argument is posited without any supporting authority. Incredibly, it is contrary to Krystal's position in the Bankruptcy Court (App. 64a) where it urged in a brief it filed that the issue was "ripe and proper for consideration" and "that it be treated and disposed of at this time." (*Supplemental Brief of Plaintiff in Opposition to Rule 12(b)(6) Motion of Defendants at 2, August 15, 2000.*) Krystal was afforded the opportunity to fully brief and argue its position. Krystal does not, because it cannot, explain how an evidentiary hearing would have altered the court's decision. Where, as here, the undisputed record reveals the

debtor's failure to disclose a putative cause of action in its Disclosure Statement despite knowledge of it, and there is no room for a trier of fact to find otherwise, there is no necessity for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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